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No. 183

[redacted]

HENRY LEONARD, PETITIONER,

vs.

THE UNITED STATES

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(33,462)

(33,492)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 183

HENRY LEONARD, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. —

HENRY LEONARD, Petitioner,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioner, Henry Leonard, respectfully represents:

1. He presented his petition to the Court of Claims February 10, 1927, claiming to be paid as a retired Major of the United States Marine Corps from May 8, 1926, to date of filing petition and thereafter continuously by counting all service rendered on both the active and retired lists in computation of his length of service for purposes of pay. The judgment of said court dismissing his petition was rendered January 9, 1928, with an opinion by Mr. Chief Justice Campbell. A motion for new trial was seasonably made within the time required by the rules of said Court of Claims, February 10, 1928, but said court after considering said motion overruled it April 2, 1928, whereby said judgment became final.

2. His claim is based on the act of March 2, 1903 (c. 975, 32 Stat. 927, 932) providing as follows:

"That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increases of longevity pay, and officers hereafter retired, except as [fol. 2] herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement."

Also upon the act of June 10, 1922 (c. 212, 42 Stat. 625) providing pay periods for all officers of the Marine Corps and other military services and providing, among other things, that the pay of the fifth period shall be paid to majors of the Army and officers of corresponding grade who have completed twenty-three years of service.

Also the act of May 8, 1926 (c. 274, 44 Stat. 417) providing that the retired pay of officers of the Marine Corps who were retired on or before June 30, 1922, shall not be less than that provided for officers of equal rank and length of service retired subsequently to that date.

3. Your petitioner has been receiving the base pay of the period provided by law for an officer of fourteen years' service, but the increase of five per centum of the base pay as for an officer of more than twenty-seven years' service.

4. Section 1 of the Joint Service Pay Act of June 10, 1922, (c. 212, 42 Stat. 625) provides "For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longecity pay," etc. Also, "Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years;" (foot p. 626). All previous legislation for computing time toward longevity pay is thus made the basis for counting service for both base or period pay and increase for each three years of service under the new act.

5. A large number of officers of the Army and Marine Corps,—amounting in the case of the Army to 86 officers, [fols. 3 & 4] and in the case of the Marine Corps to approximately 41, also a number of officers of the Navy of whom your petitioner is now unable to give even an approximate number, but which must be quite large—retired on account of wounds received in battle, are affected either as regards their present or future pay, by the decision of this case. All of these officers are of the highly meritorious class of officers retired on account of wounds received in battle who were singled out for specially favorable treatment by the act of March 3, 1903 (c. 975, 32 Stat. 927, 932), hereinbefore quoted. All these officers are now paid as of one length

of service for purposes of base pay and as of another and greater length of service for increase for each three years of service. This is not believed to be in accordance with the intent of Congress. The case is manifestly proper for the consideration of this court as a class case.

George A. King, George R. Shields, Attorneys for Petitioner.

[fols. a & 1] IN THE COURT OF CLAIMS

No. H-52

HENRY LEONARD

v.

THE UNITED STATES

I. PETITION—Filed February 10, 1927

To the Honorable the Court of Claims:

The claimant, Henry Leonard, respectfully represents:

I. The claimant was on the 11th day of June, 1898, appointed and commissioned an officer in the Marine Corps of the United States and served until February 15, 1899, and again from April 10, 1899, to September 30, 1911, when he was retired from active service on account of physical disability consisting of the loss of the left arm at the shoulder joint as a result of wounds received in battle on the 13th day of July, 1900, at Tien-Tsin City, China.

Since his retirement he has performed active service as follows:

October 6, 1911, to November 3, 1911;
February 5, 1912, to April 2, 1912;
December 26, 1912, to March 10, 1913;
June 3, 1913, to July 3, 1913;
April 17, 1917, to March 15, 1921;
November 14, 1925, to April 1, 1926.

His total active service both before and after his retirement amounted to 17 years 11 months and 25 days. He had at [fol. 2] the time of his retirement September 30, 1911, 13

years 1 month and 26 days of active service. Having been retired on account of wounds received in battle all increases, both for longevity and base pay, continued to accrue to him after his retirement by virtue of the statute hereinafter cited.

He had thus attained a total of active service and periods spent on the retired list of more than 27 years, and is entitled to the benefit provided by the statutes hereinafter referred to—the pay, both base and longevity, of a major in the Marine Corps of more than 23 years service.

II. He claimed the right to the Paymaster of the Marine Corps holding his accounts to be paid from and after the 8th day of May, 1926, as a Major in the Marine Corps entitled to the pay of the fifth period, together with all longevity increases accruing up to 27 years of service.

Said Paymaster submitted the question to the Comptroller General of the United States, who held that he was not entitled to the pay of the fifth period, but only to the pay of the third period, with proper longevity increases. His pay of that period was not equal to the pay he was already receiving. Hence it was held that he was not entitled to any benefit from the passage of the act of May 8, 1926, hereinafter referred to.

III. He therefore claims pay as a Major, United States Marine Corps, of the fifth period together with all longevity increases thereon up to those accruing for a period of 27 years, or, if he should pass a total of 30 years' service, both active and retired, before the rendition of judgment hereon, then he claims up to a total of 30 years' service longevity [fol. 3] on said pay of the fifth period. The amount due him to probable date of rendition of judgment hereon amounts to $1,000, more or less, subject to more exact computation by the General Accounting Office.

IV. This claim is based upon and depends upon the following among other statutes:

Revised Statutes, Sections 1261, 1262, 1263, providing rates of pay and increases thereon for all officers of the different ranks of the Army.

Revised Statutes, Sections 1612, 1622, providing the same rates of pay for officers of the Marine Corps and applying the same provisions as to retirement as are provided by law for officers of the Army.

Act of June 30, 1882 (22 Stat. 118), providing that the 10% for length of service shall be computed on the yearly pay of the grade.

Act of March 2, 1903 (32 Stat. 932), providing that except in case of officers retired on account of wounds received in battle no retired officer shall be allowed increase of longevity pay.

Act of June 3, 1916, Sec. 24 (39 Stat. 183), giving any retired officer detailed on active duty the rank, pay and allowances of the grade that he would have attained in due course of promotion.

Act of May 12, 1917 (40 Stat. 48), giving any retired officer detailed to active duty longevity increases for active service after retirement as well as for service on the active list.

Act of June 10, 1922 (42 Stat. 625), providing that majors who have completed 23 years' service shall receive the base pay of the fifth period, $3,500, with corresponding longevity increases thereon, and that all service now counted in computing longevity pay shall be included in the computation.

[fol. 4] Act of May 8, 1926 (44 Stat. 417), equalizing the pay of officers retired on or before June 30, 1922, with that provided for officers retired subsequently to that date.

V. No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims one thousand dollars ($1,000).

King & King, Attorneys for Claimant.

Duly sworn to by Henry Leonard. Jurat omitted in printing.

[fol. 5] II. General Traverse—Filed March. 22, 1927

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

J. G. E.

III. Argument and Submission

On December 8, 1927, this case was argued and submitted on merits by Mr. George A. King, for the plaintiff, and by Mr. William W. Scott, for defendant.

[fol. 6] **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Campbell, Ch. J.**—Filed January 9, 1928

This case having been heard by the Court of Claims, the court makes the following

Special Findings of Fact

I

Henry Leonard entered the Marine Corps June 11, 1898, and served as a second lieutenant to February 15, 1899. He reentered the Marine Corps April 10, 1899, as a second lieutenant, and served continuously through intermediate grades until he reached the grade of major, May 13, 1908. He continued to serve from that date as major to September 30, 1911, when he was retired from active service for physical disability consisting in the loss of the left arm at the shoulder joint, the result of wounds received in battle on the 13th of July, 1900.

At the time of his retirement he had had 13 years 1 month and 26 days' service.

Since retirement he has had active duty as follows:

October 6, 1911, to November 3, 1911; February 5, 1912, to April 2, 1912; December 26, 1912, to March 10, 1913;

June 3, 1913, to July 3, 1913; April 17 1917, to March 15, 1921; November 14, 1925, to April 1, 1926.

II

He has had since his retirement a total active service of 4 years 9 months and 29 days. His entire active service before and since his retirement amounts to 17 years 11 months and 25 days up to the first day of April, 1926. The total of the time he has been upon the active and retired lists amounted to 27 years on August 3, 1925. He has been paid from April 8, 1926, the pay of a major of the United States Marine Corps, retired, at the rate of $250 per month, less 20 cents per month hospital fund, which rate represents the maximum pay of a retired major of the United States Marine Corps provided by the act of May 11, 1908, under which act pay was greater than if he had been paid the base pay of a major of less than 14 years' service in [fol. 7] the third pay period prescribed by the act of June 10, 1922, and is the same as the base pay prescribed for a major of the Marine Corps of more than 14 years' service in the fourth pay period. He has also been paid longevity pay as a major of 27 years' service by reason of being retired for wounds.

If paid as a major entitled to credit of 27 years' service, he would receive as a major in the fifth pay period a difference of pay amounting from May 8, 1926, to March 31, 1927, to $723.41.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover and the petition is therefore dismissed.

Judgment is rendered in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Campbell, Chief Justice, delivered the opinion of the court:

This case grows out of the claim of a major in the Marine Corps, retired from active service on account of physical disability, consisting of the loss of his arm as a result of wounds received in battle on July 13, 1900, in China. He was retired on September 30, 1911, and at that time had had 13 years 1 month and 26 days of active service. Since that time he has had active service, amounting to 4 years 9 months and 29 days, making the total of his active service, before and since his retirement, 17 years 11 months and 25 days. The plaintiff's brief states the question as follows: "The principal question in this case is as to the right of an officer of the Marine Corps, retired for wounds received in battle, to be paid, as in the period established by the act of June 10, 1922, to which he would be entitled if his services were counted continuously through the active and retired lists." In other words, in order to ascertain the base pay of a major in the Marine Corps, retired for disability as stated, that the periods of his active service should be added to the periods of inactive service, and since the aggregate of all these exceeds 27 years that he is entitled to the base pay provided in the act of June 10, 1922, 42 Stat. 625, for the fifth pay period. We speak of the base pay of the pay periods, because the act so designates it, prescribing as it does six pay periods "and the base pay for each" of them. It also provides for longevity pay, in sec. 1, as follows: "Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years." The distinction thus made between base pay and longevity pay is not changed by other provisions of the act.

The right of a retired officer to longevity pay was recognized in the Tyler case, 16 C. Cls. 223, the decision being affirmed by the Supreme Court, 105 U. S. 244. Following these decisions the act of March 2, 1903, 32 Stat. 932, was passed which provided "That hereafter, except in cases of [fol. 8] officers retired on account of wounds received in

battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement." It is conceded that this provision cut off longevity increases accruing after retirement except in the single case of "officers retired on account of wounds received in battle," and it is claimed that the plaintiff belongs to this latter class. This condition of the law continued until the act of June 10, 1922, but a provision in that act expressly excluded plaintiff and other retired officers from its benefits, as follows: "Nothing contained in the first sentence of section 17 or in any other section of this act shall authorize an increase in the pay of officers or warrant officers on the retired list on June 30, 1922," or, as stated by his brief, "Thus the new act made no change in the pay of officers already retired." It is therefore to the later act of May 8, 1926, 44 Stat. 417, that we must look. It provides "that hereafter the retired pay of the officers and warrant officers of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service, who were retired on or before June 30, 1922, shall not be less than that provided for the officers and warrant officers of these services of equal rank and length of service, retired subsequent to that date." The reference must therefore be to the provisions of the act of June 10, 1922, for officers and warrant officers retired subsequent to June 30, 1922, since the officer in the instant case is entitled to receive from and after May 8, 1926, not less than the retired pay provided for an officer of equal rank and length of service retired subsequent to that date, with the provision, however, that it shall not "operate to reduce the pay of any officer or warrant officer now on the retired list." The act of June 10, 1922, makes provision for the pay of retired officers, section 17 of the act being as follows:

"Sec. 17. That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided in this act: Provided, That nothing contained

in this act shall operate to reduce the present pay of officers, warrant officers and enlisted men now on the retired list or officers or warrant officers in an equivalent status of any services mentioned in the title of this act. Active duty performed after June 30, 1922, by an officer on the retired list or its equivalent shall not entitle such officer to promotion: * * * Retired officers of the Army, Navy, Marine Corps, Coast Guard, and Coast and Geodetic Survey below the grade of brigadier general or commodore and retired warrant officers and enlisted men of those services, shall, when on active duty, receive full pay and allowances."

The retired pay is therefore "to be computed as now authorized by law," but on the basis of pay provided by the act. The law had long provided, by section 1274, Revised Statutes, that "officers retired from active service shall receive 75 per centum of the pay of the rank upon which they were retired." The pay of the rank of major upon which this officer was retired was fixed by the act of May 11, 1908, 25 Stat. 106, 108, at $3,000.00 per annum. [fol. 9] In addition he was entitled to longevity pay because of being within the exception already stated in the act of March 2, 1903. The officer was retired with less than 14 years of active service to his credit and would not come within the fourth pay period prescribed by the act of June 10, 1922, unless there be added the additional active service rendered after his retirement. And adding the periods of his active service after retirement to that rendered before his retirement, there results active service for more than 17 years, which would bring the officer into the fourth pay period, the base pay of which is $3,000. We think there can be no doubt that the officer should be credited with all active service, before and after the date of his retirement. See 5 Comp. Gen. 1038. But the contention is that the length of service with which the officer is to be credited is not alone active service but should include the periods while he was on the retired list, though not in active service, and this would bring him within the fifth pay period. To this contention we can not assent. There is nothing in section 17 of the act of June 10, 1922, that sustains it and the provision to be found in section 1 of the act, 42 Stat. 627, that "For officers in the service on June 30, 1922, there

shall be included in the computation all service which is now counted in computing longevity pay" does not refer to or include officers on the retired list. It has reference to officers on the active list. Clearly, when Congress says that nothing contained in the act shall authorize an increase in the pay of officers on the retired list, on June 30, 1922, it can not be supposed that in the next sentence, save one, the Congress was providing a method whereby there would be an increase in the pay of these same officers. To give the quoted language any meaning it must be referred to its context, where the act is dealing with pay of officers in the active service. And when the act of May 8, 1926, is considered, it being the act relied upon as securing to the plaintiff rights conferred by the act of 1922 upon retired officers, it appears that equalization of pay is with officers retired subsequent to June 30, 1922. The retirement thus contemplated is from active service. The act of 1922 prescribes pay periods and base pay for each; also it provides longevity pay for officers in the active service. Aided by the act of May 8, 1926, it regulates the pay of retired officers, but neither act authorizes the retired officer to go from one pay period into another solely because of length of time elapsing since his retirement. The advancement from one pay period to another can be based only on active service. The base pay of the fourth pay period is the same amount as that prescribed by the act of May 11, 1908. The plaintiff is not entitled to the base pay of the fifth pay period, and having been paid as much as an officer retired subsequent to June 30, 1922, and of equal rank and length of service, would receive, the petition should be dismissed. And it is so ordered.

Moss, Judge; Graham, Judge; and Booth, Judge, concur.

[fol. 10] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 9th day January, A. D., 1928, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order and adjudge that

the plaintiff, as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered and *and* decreed that the United States shall have and recover of and from the plaintiff the cost of printing the record in this court. No printing having been done no costs are taxed.

VI. Proceedings After Entry of Judgment

On February 10, 1928, the plaintiff filed a motion for a new trial.

On April 2, 1928, the court entered the following order on said motion:

Order

It is ordered by the Court this 2d day of April, 1928, that the plaintiff's motion for new trial be and the same is overruled.

[fol. 11] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 33,492. Court of Claims. Term No. 183. Henry Leonard, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed June 8th, 1928. File No. 33,492.

Supreme Court of the United States

Order Allowing Certiorari—Filed October 8, 1928

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.